*THE HONOURABLE SRI JUSTICE V.V.S.RAO

+WRIT PETITION No.15887 of 2001

%03-11-2004

Chavva reddy Saraswatamma

..PETITIONER

Vs.

$ The Presiding Officer-cum-Election Officer/Nodal Officer, Mandal Praja Parishad, Kamalapuram, Cuddapah District and others.

..RESPONDENTS

! COUNSEL FOR PETITIONER: Sri Hemendranadh Reddy representing Sri Ella Reddy

^ COUNSEL FOR RESPONDENTS: Standing Counsel for State Election Commission

<GIST

>HEAD NOTE:

?CASES REFERRED:

1. 2002 (6) ALT 18 (DB)
2. AIR 1994 SC 1558 (para 8)
3. 1993 Supp (4) SCC 46

IN THE HIGH COURT OF JUDICATURE, ANDHRA PRADESH
AT HYDERABAD

(Special Original Jurisdiction)

WEDNESDAY, THE THIRD DAY OF NOVEMBER
TWO THOUSAND AND FOUR

PRESENT

THE HON'BLE MR JUSTICE V.V.S.RAO

-

WRIT PETITION NO : 15887 of 2001

Between:

Chavva Reddy Saraswatamma, W/o. Chavvareddy Narayanareddy,

r/o. 9/B Padameta Veedhi, Kamalapuram, Cuddapah District.

..... PETITIONER

AND

1 The Presiding Officer-cum Election Officer/ Nodal Oficer, Mandala

Praja Parishad, Kamalapuram, Cuddapah Dist.

2 State Election Commission, rep by its Secretary, 3rd Floor,
Budha Bhavan, M.G. Road, Secunderabad -3

....RESPONDENTS

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court may be pleased to issue a writ, order or direction more in the nature of writ of mandamus declaring that the order in Form V-C made under Rule 13, Sub Rule 7(ii) and Rule 25, of G.O.Ms., No. 756 Panchayat Raj, RD and Relief (Election-III) dt, 30.11.1994 was passed without following the directions issued by this Honourable Court in W.P. No. 11641/1997 dt. 31.7.1998 and batch and directions issued by this Honourable court in W.P.No. 15343/2001 dt. 27.7.2001 and therefore illegal.

Counsel for the Petitioner: MR.Hemendranadh Reddy representing Mr.E.Ella Reddy

Counsel for the Respondents: Standing Counsel for State Election Commission

The Court made the following :

THE HON'BLE SRI JUSTICE V.V.S. RAO

WRIT PETITION No.15887 of 2001

ORDER:

INTRODUCTION

A short question of considerable importance would arise for consideration in this writ petition as to the right of an elected person to seek election as President of Mandal

Parishad as a candidate of political party other than the one on whose behalf such person got elected in the primary elections. The effect of a party whip issued as per the provisions of law on the exercise of such right is also an incidental and inseparable query that requires an answer.

BACKGROUND FACTS

In the elections conducted for the offices of the members of territorial constituency of Kamalapuram Mandal under the provisions of A.P. Panchayat Raj Act, 1994 (the Act, for brevity) and A.P. Panchayat Raj (Conduct of Elections of Members and Sarpanch of Gram Panchayat, Members of Mandal Parishad and Members of Zilla Parishad) Rules, 1994, the petitioner contested as a candidate of Telugu Desam Party (TDP). In the results declared on 17.7.2001, she was declared elected as member of Mandal Parishad Territorial Constituency (MPTC), Kamalapuram in Kadapa District. The next day she submitted resignation to primary membership of TDP. The President of TDP, Kamalapuram Mandal accepted the resignation on the same day i.e., 18.7.2001. She, thereafter, joined Indian National Congress (INC). As per the procedure, the President of the Mandal Parishad is elected by an electoral college consisting of all the MPTC members in the Mandal concerned. The election of the President was scheduled on 22.7.2001. The petitioner was nominated as the candidate for the office of the President on behalf of INC. She also submitted B-Form issued by the concerned party official of INC nominating her as INC candidate for the office of President. She got majority of the votes and therefore was declared elected as President of Mandal Parishad, Kamalapuram.

On the eve of elections to the post of President of Mandal Parishad, the two main political parties issued whip directing all the MPTC members to be present in the meeting called for and vote for the candidate nominated by the respective political parties. One K. Mohan Reddy, who was appointed as the whip of TDP informed the petitioner that she has violated the party whip directing her to vote in favour of K. Parvathamma, TDP nominee for the post of President. Based on such a complaint given by TDP whip on 22.7.2001, the first respondent issued a show cause notice dated 24.7.2001 as to why her membership for Kamalapuram II Mandal Parishad Constituency should not be cancelled. The petitioner submitted explanation on 27.7.2001. The petitioner also filed a writ petition being W.P. No.15343 of 2001. By order dated 27.7.2001 the writ petition was disposed of directing the first respondent to consider the objections of the petitioner in the light of the law declared by the Division Bench of this Court in W.P. No.11641 of 1997 and batch, and instructions issued by State Election Commission, the second respondent herein, vide Circular No.853/SEC-B1/2001-9 dated 21.7.2001. The first respondent thereafter issued Form No.V-C under Rule 13 (7) (ii) and Rule 25 (7) (ii) of the Rules declaring the petitioner to have ceased to be a member of Kamalapuram II Mandal Parishad Territorial Constituency. This order is assailed in this writ petition.

The first respondent filed a counter affidavit stating that first respondent considered the explanation submitted by the petitioner pursuant to show cause notice dated 24.7.2001 and duly followed the procedure before issuing impugned order. It is also stated that on 22.7.2001 in the meeting convened for election of co-opted members,

President and Vice President of the Mandal Parishad, the first respondent informed all the members orally regarding the whip issued by TDP, and therefore, even if the party whip is not served on the petitioner as alleged, the petitioner was bound to vote according to the whip failure of which attracts Sections 153 and 181 of the Act. The State Election Commission also issued a fax message on 27.1.2001 opining that any MPTC member elected on behalf of recognized political party shall cease to be member if such member disobeys the directions of party whip issued under Rule 7 of the Rules. The petitioner was elected on behalf of TDP but contested for the post of President of Mandal Parishad as a nominee of INC. These facts attract disqualification under Section 153 of the Act. While not seriously disputing other facts leading to filing of the writ petition, an objection is raised contending that in view of the availability of alternative remedy by way of approaching the election tribunal a writ petition is not maintainable. Reliance is placed on the judgment of the learned single Judge in W.P. Nos.18953 and 18954 of 2001 dated 28.11.2001 wherein it was held that an order of disqualification is a matter for election tribunal and that writ petition is not maintainable under Article 226 of the Constitution of India.

RIVAL SUBMISSIONS

Learned Counsel for the petitioner Sri Hemendranadh Reddy representing Sri Ella Reddy made the following submissions. There is no prohibition in the Act preventing a person elected on one party ticket to resign and join other party for the purpose of contesting to another post. The petitioner ceased to be a member of TDP with effect from 18.7.2001 and therefore any whip issued to the petitioner is not binding on her. The party whip if any was issued to MPTC members elected on TDP ticket and continued to be members of TDP as on 22.7.2001 when the petitioner contested as nominee of INC for the office of President, the petitioner was a member of INC, and therefore, no official of TDP could have validly issued a whip to the member belonging to opposite party. The TDP whip has not issued in writing and in the absence of such whip the provisions of Sections 153 and 181 are not attracted. The petitioner submitted a detailed explanation but the first respondent issued the impugned order without considering the explanation submitted by the petitioner.

Though Sri V.V. Prabhakara Rao, learned Counsel for State Election Commission, filed a counter affidavit on behalf of the first respondent, there is no appearance for the respondents.

Before taking up the main controversy for consideration, a minor point need to be disposed of. An objection is raised in the counter affidavit of respondents that a Writ Petition is not maintainable and that the remedy lies before the duly constituted Election Tribunal. Reliance is placed on the judgment of this Court dt.28.11.2001 in W.P.Nos.18953 of 2001 and 18954 of 2001. The view of the learned Single Judge in the said judgment that even in a case falling under second proviso to sub-section (1) of Section 153 of the Act, remedy lies in moving the Election Tribunal, was reversed by the Division Bench in **S.Jyothi v. Presiding Officer/Election Officer**. The Division Bench in paragraph 19 of the reported judgment laid down as under.

In conclusion, we hold that under Section 233 of the Act, an Election Petition against the order made by the Presiding Officer disqualifying a member of the Mandal Parishad under Rule 13(7)(ii) is not maintainable. Since the order made by a Presiding Officer under Rule 13(7)(ii) of the President/Vice-President Election Rules disqualifying a member of the Mandal Parishad is made final and no other legal remedies are provided against such an order, a disqualified member of the Mandal Parishad can invoke the extraordinary jurisdiction of the High Court under Art. 226 to call in question the legality and validity of the order. In other words, writ petitions are maintainable.

POINT FOR CONSIDERATION

The Constitution of India was amended by inserting Part IX (consisting of Articles 243 to 243-O) and Part IXA (consisting of Articles 243P to 243ZG), by the Constitution (Seventy-third Amendment) Act, 1992 and the Constitution (Seventy-fourth Amendment) Act, 1992 respectively, with effect from 01-06-1993. Though Article 40 of the Constitution of India enshrined duty of the State to organize village panchayats with powers and authority of self-Government, and though such panchayat system existed prior to these constitutional Amendments, Parliament thought it fit to elevate statutorily created local bodies – panchayats and municipalities; as independent units under protective umbrella of constitutional provisions and with a mandate to hold periodical elections to such local units. After coming into force of the two Amendments, all the State Governments were required either to amend or repeal the then existing statutes dealing with panchayats and municipalities so as to bring them in consonance with the constitutional provisions in Part IX and Part IXA of the Constitution of India. Indeed these two Amendments permitted the continuance of existing laws and panchayats only if such laws are not inconsistent with the provisions of the two 'Constitution Amendment Acts'. Therefore while interpreting any provision of A.P.Panchayat Raj Act, 1994, the provisions of the Constitution in Part IXA cannot be ignored. It is, therefore, necessary to read relevant constitutional provision dealing with disqualification for being chosen as, and for being, a member of a panchayat. Article 243F deals with disqualification for membership and reads as under.

243F. Disqualifications for membership:- (1) A person shall be disqualified for being chosen as, and for being, a member of a Panchayat-

a. if he is so disqualified by or under any law for the time being in force for the purposes of elections to the Legislature of the State concerned:

Provided that no person shall be disqualified on the ground that he is less than twenty-five years of age, if he has attained the age of twenty-one years;

b. if he is so disqualified by or under any law made by the Legislature of the State

(2) If any question arises as to whether a member of a Panchayat has become subject to any of the disqualifications mentioned in clause (1), the question shall be referred for the decision of such authority and in such manner as the Legislature of a State may, by law, provide.

Sub-Article(1) of Article 243F enumerates two types of laws which govern the disqualifications for membership. The first one is the law for the time being in force

for the purposes of elections to Legislature of the State and the second one is the law made by the Legislature of the State. There would be no gain saying to mention that in so far as the second type of law is concerned, the A.P.Panchayat Raj Act, 1994 in Sections 17 to 20 and 20A deal with disqualification of members of Gram Panchayat. Sections 153(1), 155, 156 (read with Sections 18 to 20) deal with qualifications and disqualifications for election of member of Mandal Parishad. In so far as Zilla Parishads are concerned, Sections 183, 184 read with Sections 18 to 20 deal with qualifications and disqualifications for election as member of Zilla Parishad. In the three tire Panchayat Raj system prevalent in the State of Andhra Pradesh, the election to the office of sarpanch at panchayat level is by the method of direct elections by the persons whose names appear in the electoral roll for the Gram Panchayat. In so far as the President and Vice President of Mandal Parishad on one hand and the election of Chairperson and Vice Chairperson of Zilla Parishad on the other hand, the election is by the method of indirect election that is to say Mandal Parishad Territorial Constituency members in a Mandal Parishad and all the elected Zilla Parishad Territorial Constituency members elect the President or Vice President and/or the Chairperson or Vice Chairperson, as the case may be, by show of hands. This case pertains to the election of the President of Mandal Parishad and therefore it is necessary to refer to sub-section (1) of Section 153, which is relevant and reads as under.

Sec.153. Election, reservation and term of office of President and Vice-President:- (1) For every Mandal Parishad there shall be one President and one Vice-President who shall be [elected by and from among the elected members specified in clause (i) of sub-section (1) of Section 149 by show of hands duly obeying the party whip given by such functionary of the recognised political party as may be prescribed]. If at an election held for the purpose no President or Vice-President is elected, fresh election shall be held. The names of the president and the Vice-President so elected shall be published in the prescribed manner:

Provided that if a Member of the Legislative Assembly of the State or of either House of Parliament is elected to either of the said offices, he shall cease to hold such office unless within fifteen days from the date of election to such office, he ceases to be Member of the Legislative Assembly of the State or of either House of Parliament by resignation or otherwise;

Provided further that a member voting under this sub-section in disobedience of the party whip shall cease to hold office forthwith and the vacancy caused by such cessation shall be filled as a casual vacancy.

The Governor of Andhra Pradesh in exercise of powers under Section 268(1) read with Sections 149(1)(v), 153(1)&(6), 177(3)(v) and 181(1)&(7) of the Act promulgated Andhra Pradesh Conduct of Election of Member (Co-opted) and President/Vice-President of Mandal Parishad and Member (Co-opted) and Chairman/Vice-Chairman of Zilla Parishad Rules, 1994 (hereafter called, the Rules). Part IV of the Rules deals with Election of President/Vice-President of Mandal Parishad whereas Part VIII of the Rules deals with Election of Chairman/Vice-Chairman of the Zilla Parishad. Sub-rule (6) of Rule 13 of the Rules is to the effect that every recognised political party may appoint on behalf of that political party a whip and intimation of such appointment shall be issued by the State President or a person authorised by him under his seal and such intimation shall be sent to the Presiding Officer to reach him on or before 11.00 a.m. on the day preceding the day

of election to the Office of the President/Vice-President of the Mandal Parishad. As per sub-rule (7) of Rule 13 of the Rules, any member of the Mandal Parishad elected on behalf of a recognised political party shall cease to be a Member of M.P.T.C. for disobeying the directions of the Party Whip so issued. In the event of such disobedience, the Presiding Officer, on receipt of a written report from the party whip within three days of the election that a member belonging to his party has disobeyed the whip issued in connection with the election, forthwith declare in Form V-C that the member has ceased to hold Office and the decision of the Presiding Officer shall be final. The procedure contemplated under Rule 13 of the Rules for election of President may be noticed. Rule 13 of the Rules reads as under.

13.(1) A candidate for the office of the President/Vice-President of a Mandal Parishad shall be proposed by one member and seconded by another. The names of all the candidates validly proposed and also seconded shall be read out by the Presiding Officer at such meeting.

A candidate for the Office of President/Vice-President of a Mandal Parishad shall be proposed by one member and seconded by another. If any candidate claims to be contesting on behalf of a political party, he shall produce an authorisation from the President of the recognised political party of the State or a person duly authorised by the State President under his office seal and such authorisation shall be produced before the Presiding Officer on or before 10.00 A.M. on the day of the election for the election of the Office of President/Vice-President of Mandal Parishad.

The names of all candidates validly proposed and seconded shall be read out along with the name of the Political Party which has set him up by the Presiding Officer in such a meeting.

(2) If only one candidate is duly proposed, there shall be no election and he shall be declared to have been elected.

(3) If there are two or more candidates, election shall be held by show of hands and votes taken of the members present at the meeting.

(4) The Presiding Officer shall thereafter record the number of votes polled, for each such candidate ascertained by show of hands. He shall announce the number of votes secured by each candidate and shall declare the candidate who secures the highest number of votes, as elected.

(5) In the event of there being an equality of votes between the two candidates, the Presiding Officer shall draw lots in the presence of the members and the candidates whose name is first drawn shall be declared to have been duly elected.

(6) Every recognised political party may appoint on behalf of that political party a whip and intimation of such appointment shall be issued by the State President or a person authorised by him under his seal and such intimation shall be sent to the Presiding Officer to reach him on or before 11.00 A.M. on the day preceding the day of election to the Office of the President/Vice-President of the Mandal Parishad.

Explanation:- Recognised political party means a political party recognised by Election Commission of India, New Delhi.

(7) (i) Any member of the Mandal Parishad elected on behalf of a recognised political party shall cease to be a Member of the Mandal Parishad for disobeying the directions of the Party Whip so issued.

(ii) The Presiding Officer shall, on receipt of a written report from the party Whip within three days of the election, that a Member belonging to his party has disobeyed the Whip issued in connection with the election forthwith declare in Form V-C that the Member has ceased to hold Office and the decision of the presiding Officer shall be final.

A conspectus of Section 153(1) read with Rules 11 to 14 of the Rules would reveal that when a party whip appointed by a political party issues a direction to the members to be present and vote in favour of the party candidate and such direction

is disobeyed, the same would entail in disqualification and the Presiding Officer shall have to declare that such member has ceased to hold Office.

The other disqualification is under law for the time being in force for the purpose of elections to Legislature of the State. What is the law for the law of disqualifications for the purpose of elections to Legislature of the State? We have to necessarily refer to Article 191 of the Constitution of India, which deals with disqualifications of membership of State Legislature as well as the provisions of Sections 7 to 11A of the Representation of the People Act, 1951. Article 191 of the Constitution of India reads as under.

191. Disqualifications for membership-(1) A person shall be disqualified for being chosen as, and for being, a member of the Legislative Assembly or Legislative Council of a State-

a. if he holds any office of profit under the Government of India or the Government of any State specified in the First Schedule, other than an office declared by the Legislature of the State by law not to disqualify its holder;

b. if he is of unsound mind and stands so declared by a competent court;

c. if he is an undischarged insolvent;

d. if he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgement of allegiance or adherence to a foreign State;

e. if he is so disqualified by or under any law made by Parliament.

Explanation – For the purposes of this clause, a person shall not be deemed to hold an office of profit under the Government of India or the Government of any State specified in the First Schedule by reason only that he is a Minister either for the Union or for such State.

(2) A person shall be disqualified for being a member of the Legislative Assembly or Legislative Council of a State if he is so disqualified under the Tenth Schedule.

Sub-article (2) disqualifies a person for being a member of Legislative Assembly or Legislative Council if he is so disqualified under the Tenth Schedule to the Constitution of India. The latter was added by Constitution (Fifty-second Amendment) Act, 1985 with a view to prevent evil of political defections and to outlaw defections. An analysis of Tenth Schedule, as found in the judgment of the Supreme Court in **Ravi S.Naik v Union of India**, may be extracted.

The provisions of the Tenth Schedule apply to members of either House of Parliament or the State Legislative Assembly or, as the case may be, either House of the Legislature of a State. Paragraph 2 of the Tenth Schedule makes provision for disqualification on the ground of defection. Sub-paragraph (1) deals with a member belonging to a political party. It provides for disqualification in two situations, viz., (i) if he has voluntarily given up his membership of such political party; and (ii) if he votes or abstains from voting in such House contrary to any direction issued by the political party to which he belongs or by any person or authority authorised by it in this behalf, without obtaining, in either case, the prior permission of such political party, person or authority, and such voting or abstention has not been condoned by such political party, person or authority within fifteen days from the date of such voting or abstention. Paragraph 3 removes the bar of disqualification in case of split in a political party provided the group representing a faction which has arisen as a result of split consists of not less than one-third of the members of such legislature party. Paragraph 4 removes the bar of disqualification on the ground of defection in a case of merger of a political party with another political party. In sub-paragraph (1) of paragraph 6 the question as to whether a member of a House has become subject to disqualification under the Schedule is required to be referred for the decision of

the Chairman or, as the case may be, the Speaker of such House and his decision shall be final. Under sub-paragraph (2) of paragraph 6, all proceedings under sub-paragraph(1) of paragraph 6 in relation to any question as to disqualification of a member of a House under the Schedule are to be deemed to be proceedings in Parliament within the meaning of Article 122 or, as the case may be, proceedings in the Legislature of a State within the meaning of Article 212. Paragraph 7 bars the jurisdiction of all courts in respect of any matter connected with the disqualification of a member of a House under the Schedule. Paragraph 8 empowers the Chairman or the Speaker of a House to make rules for giving effect to the provisions of the Schedule and such Rules may provide for matters specified in clauses (a) to (d) of sub-para (1).

A member of Legislative Assembly incurs disqualification for being a member, i) when he voluntarily gives up his membership of political party and ii) if such member votes or abstains from voting contrary to any direction (whip) issued by the political party to which he belongs. There cannot be any doubt that as per Article 243F(1)(a) of the Constitution of India read with Article 191(2) and paragraph 2 of Tenth Schedule to the Constitution of India as well as Section 153(1) of the Act, an MPTC member, who voluntarily gives up his membership of the political party after getting elected as a nominee of such political party shall have to be disqualified for being a member of MPTC. It cannot be ignored that “the law for the time being in force” as mentioned in Article 243F(1)(a) of the Constitution of India also includes the Constitution of India and as a necessary corollary Article 191(2) and Tenth Schedule of the Constitution of India. These constitutional provisions have to be read into Article 243F(1)(a) of the Constitution of India and therefore the petitioner, who got elected as a nominee of the TDP lost the right to be MPTC member, the moment she resigns from TDP and joins INC. Though the provisions of the Act especially Section 153(1) of the Act and Rules 11 to 14 of the Rules do not specifically prohibit an MPTC member elected on one party ticket to resign and join another party, having regard to Article 243F(1)(a) of the Constitution of India, it has to be held that an MPTC member elected as a nominee of TDP would incur disqualification, the moment such a member joins INC and contests the election as a nominee of INC for the purpose of President.

The learned counsel nextly contends that the notice issued by the party whip was not received by the petitioner. According to the first respondent, the notice issued by party whip of TDP was duly served on the petitioner and the first respondent also announced before the issue was put to vote about party whip issued by TDP as well as INC. Counter affidavit was filed in this case on 07.02.2004 but the petitioner has not chosen to file any reply affidavit denying the counter averments. Therefore, these unrebutted counter averments must be taken as admitted facts (See **Naseem Bhanu v. State of U.P**). The submission of the petitioner, therefore, is liable to be rejected.

Though the petitioner in the relief sought a declaration that the action of the respondents is in breach of the directions issued by this Court in Writ Petition No.11641 of 1997 etc., the learned counsel for the petitioner has not made any attempt to place the said judgment. This Court has called for the judgment from the Registry. In the said unreported judgment of the Division Bench, in **M.Mohan Rao v. The Revenue Divisional Officer, Sangareddy**, dt.31.7.1998 this Court held that though Rule 8 of the Rules for moving motion of no confidence does not

contemplate the issue of notice prior to declaration that a member has ceased to hold office for disobeying a party whip, having regard to Article 243F(2) of the Constitution, such requirement of issue of notice must be read in the provision. There is no dispute in that regard in the present case. Admittedly, first respondent issued a show cause notice to the petitioner to which the petitioner duly sent explanation on 27.7.2001 claiming immunity from the provision as he resigned from TDP and joined INC. Further, the petitioner has not specifically denied the averment made in the counter affidavit that the party whip was duly served on her and at the time of meeting, first respondent informed all the MPTC Members about the whip issued by TDP as well as INC to their members. Therefore, it cannot be said that the impugned order is in violation of the judgment of the Division Bench of this Court.

In the result, for the above reasons, the Writ Petition is devoid of merit and is accordingly dismissed, but without any order as to costs.

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(V.V.S.RAO,J)

.11.2004

pln/ys/bnr

Note: L.R. COPY BE MARKED.

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To

One fair copy to the Hon'ble Mr.Justice V.V.S.Rao (for his Lordships kind perusal)

1. The Presiding Officer-cum-Election Officer/Nodal Officer, Mandal Praja Parishad, Kamalapuram, Cuddapah District.
2. The Secretary, State Election Commission, III floor, Budha Bhavan, M.G.Road, Secunderabad-3.
3. 8 LR copies.
4. Under Secretary, Union of India, Ministry of Law, Justice and Company Affairs, New Delhi.

5. The Secretary, A.P.Advocates Association Library, High Court Buildings, Hyderabad.

6. 2 CD copies.